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IRS Guidance on Employee Benefits Implications of Supreme Court Obergefell Decision on Same-Sex Marriage

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The ***Internal Revenue Service (IRS)*** recently issued Notice 2015-86, which provides some additional clarification, in the form of questions and answers, on the treatment of same-sex spouses under tax-qualified retirement plans and health and welfare plans, including cafeteria plans, as a result of the June 26, 2015, decision from the ***Supreme Court*** of the United States in *Obergefell v. Hodges*.

Background

In 2013 in ***United States v. Windsor*****,** the Supreme Court ruled that Section 3 of the ***Defense of Marriage Act (DOMA)***, which previously limited any marriage benefits under federal law to opposite-sex spouses, was unconstitutional. Subsequent IRS guidance clarified that favorable federal tax treatment of spousal benefit coverage would extend to all same-sex couples legally married in any jurisdiction with laws authorizing same-sex marriage, regardless of whether the couple currently resided in a state where same-sex marriage is recognized.

In *Obergefell*, the Supreme Court determined that it is unconstitutional for a state to ban same-sex couples from exercising the fundamental right to marry, requiring all states to permit same-sex couples to marry and to recognize same-sex marriages validly entered into in other jurisdictions. These Supreme Court cases and subsequent guidance did not extend any rights to individuals who entered into a domestic partnership, civil union, or similar form of relationship.

New Guidance Under Notice 2015-86

The IRS states in Notice 2015-86 that “because these same marriages have already been recognized for federal tax law purposes pursuant to *Windsor* and the Post-*Windsor* guidance, Treasury and the IRS do not anticipate any significant impact from *Obergefell* on the application of federal tax law to employee benefit plans.” This new guidance thus appears to intend to clarify, and not expand in any way, the prior guidance and does not set forth any required plan changes or

amendments. Rather, Notice 2015-86 blesses many of the actions plan sponsors have already taken with respect to coverage of same-sex partners and application of the Internal Revenue Code Section 125 change-in-status rules.

Despite the lack of any required amendments as a result of *Obergefell*, the IRS clarifies that plan sponsors may amend their plans to make certain optional changes or clarifications. If a plan sponsor made certain optional changes to a qualified retirement plan retroactive to a period before June 26, 2013 (the date of the *Windsor* decision) without a formal plan amendment, then the plan sponsor may now amend the plan to reflect these changes without affecting the plan's qualified status. For example, one notable and immediate action required by some plan sponsors is that defined benefit plans that provide special qualified joint and survivor annuity (QJSA) and qualified pre-retirement survivor annuity (QPSA) election rights or same-sex spouse coverage effective pre-*Windsor* must be amended to reflect those benefits. Since these changes are discretionary in nature, plan sponsors that have not already amended their plans to reflect these rights should have adopted such amendments before the end of 2015.

Notice 2015-86 again points out that plan sponsors of health and welfare plans are not required to offer any specific rights or benefits to the spouse of a participant and clarifies that no changes to the terms of a health and welfare plan are required as a result of *Obergefell*. Employers with fully insured health and welfare plans provided under policies issued in states that, prior to the Supreme Court's decision, had banned same-sex marriage, are now required to offer coverage to same-sex spouses that is equivalent to the coverage those employers offer to opposite-sex spouses. Depending on the plan's terms and applicable law, this may require a change in status to permit an election for the same-sex spouse to begin participating. However, although employers with self-insured plans are not required to provide coverage to same-sex spouses, these employers face a risk of federal and state discrimination lawsuits if they continue to provide coverage only to opposite-sex spouses.

As mentioned above, Notice 2015-86 also clarifies that a cafeteria plan may permit a participant to revoke an existing election mid-year and submit a new election to cover a same-sex spouse if the terms of operation of the plan change during the plan year to begin permitting coverage of same-sex spouses. The IRS clarifies that this change in status election is available to cafeteria plans that allow participants to make a change in election due to a significant improvement in coverage under an existing coverage option and is available both to participants who are currently enrolled and those who had not previously elected coverage to add coverage for themselves and a same-sex spouse. If a cafeteria plan does not allow a change in election due to a significant improvement in coverage, the plan sponsor may amend the cafeteria plan within certain timeframes to permit such an election.

Next Steps for Employers

As part of an overall review, employers in all states should take action to ensure that their benefit plans comply with applicable law with regard to benefits for same-sex spouses. Employers who have not already done so should review their employee benefit plans to prepare for requests for benefits coverage from employees who marry their same-sex partner, particularly in states where same-sex marriage was not previously legal. Additionally, employers should review their benefit plans to determine whether any *Obergefell*-related amendments may be required or desired prior to the end of 2015 to clarify the administration of spousal rights and benefits for same-sex spouses.

The most common requests for benefits for a same-sex spouse are likely to be coverage under an employer's medical, dental and vision plans, in addition to certain spousal benefits that are required by federal law (*e.g.*, spousal protection under qualified retirement plans and special enrollment and

COBRA rights under health and welfare plans). Benefit requests may relate to any of the employer's various benefit programs, particularly those benefits where equality for same-sex spouses were not previously required by state law. Other spousal benefits that employers may need to extend to employees' same-sex spouses can include group rates for insurance plans, such as supplemental life insurance, long-term care insurance, home insurance and automobile insurance, as well as other benefits such as bereavement leave, moving or relocation expenses, tuition reimbursement, employee discounts and employee assistance programs.

Now that marriage equality exists between same-sex and opposite-sex spouses, employers should determine whether any changes, such as a phase-out of coverage, should be made to the coverage and other benefit options provided to unmarried partners who are in a domestic partnership or civil union. The employer should delicately consider how any such phase-out of coverage would apply to coverage provided to same-sex and opposite-sex unmarried partners, as applicable. The employer should take care to properly communicate any benefit phase-out and revise any applicable enrollment materials and corresponding plan documents.

In addition to extending required benefits to same-sex spouses, employers should review their payroll procedures with respect to the taxation of such benefits to ensure the proper federal and state tax treatment of benefits extended to same-sex spouses and consider how to communicate these changes to employees.

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